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Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

BRIEF OF *AMICI CURIAE*

The National Puerto Rican Coalition and The Puerto Rican Forum

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JORGE BATISTA
ROBERT HERMANN
Puerto Rican Legal Defense and Education Fund
95 Madison Avenue
New York, New York 10016

EVAN A. DAVIS
JONATHAN I. BLACKMAN
CLEARY, GOTTLIEB, STEEN & HAMILTON
One State Street Plaza
New York, New York 10004

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BRIEF OF *AMICI CURIAE*

The National Puerto Rican Coalition and The Puerto Rican Forum

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Interest of the *Amici*[1]

The National Puerto Rican Coalition, a non-profit corporation based in New York City, is an alliance of over 40 prominent Puerto Rican leaders. They represent organiza-

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[1] Letters of the petitioners and respondent giving their consent to the filing of this brief have been filed with the Clerk of this Court.

tions throughout the country, both private and governmental, which have worked separately and together to improve the social and economic conditions of Hispanic persons. Among the Coalition's major concerns are economic development, the fostering of equal opportunity and the encouragement of affirmative action programs for Puerto Ricans. The Puerto Rican Forum is a non-profit organization, founded in 1957 and located in New York City, which concentrates its work in employment and job training. Its main goal is the advancement of the Hispanic community in the United States. The organization has a major interest in enhancing and increasing employment opportunities for Puerto Ricans and other Hispanics. Both of these organizations have worked to foster equal employment opportunity for Puerto Ricans through a variety of means, including affirmative action programs.

This litigation places before this Court the question of the legality of an affirmative action program to integrate minorities into certain craft positions at a large industrial plant. The Court's decision is likely to affect the validity of other programs designed to bring about an integrated workforce in which all Americans can participate on a basis of equality and without discrimination on account of racial or ethnic status.

Hispanic persons have an important interest in these issues. They constitute the second largest minority in this country. As of 1977, approximately one out of every twenty Americans was of Spanish descent,[2] including nearly 1.7 million persons of Puerto Rican birth or parentage resid-

[2] United States Bureau of the Census, *Current Population Reports*, Series P-20, No. 317, "Persons of Spanish Origin in the United States: March 1977" at 3 (December 1977).

ing in the continental United States.[3] The incidence of poverty and unemployment among this Puerto Rican population is more severe than that among virtually any other ethnic group in the United States.[4] In 1977, Puerto Ricans experienced an unemployment rate of 14.6 percent, as compared with 6.2 percent for white Americans.[5] For male Puerto Rican teenagers in the preceding year, the unemployment rate was a staggering 55.2 percent.[6]

Where Puerto Ricans are employed, it is often in the lowest-skilled and lowest-paying jobs. As of March 1976, more than 30 percent of employed Puerto Rican workers were operatives, including factory workers, dressmakers and seamstresses, while only 15.1 percent of the total employed population held jobs in this low-paying category. The second largest job category for Puerto Ricans was low-paying service employment, such as restaurant and cus-

[3] United States Commission on Civil Rights, *Puerto Ricans in the Continental United States: An Uncertain Future* at 5 (1976).

[4] *Id.*

[5] United States Commission on Civil Rights, *Improving Hispanic Unemployment Data: The Department of Labor's Continuing Obligation* at 4, 8 (1978).

[6] United States Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* at 32 (1978). These figures considerably understate the dimensions of the Puerto Rican unemployment problem, because they are based on the Department of Labor definition of unemployment based on the percentage of the labor force that is jobless, with the labor force defined as those actively seeking employment. This definition does not take account of those who have grown so discouraged about the prospects for obtaining employment that they have stopped looking for work. While it is difficult to ascertain the size of this group with complete precision, the federal government estimated in 1966 that if it were included in calculating the unemployment rate, it would have produced a figure of 33.1% as the real unemployment rate of Puerto Ricans in the slum areas of New York City. United States Commission on Civil Rights, *Puerto Ricans in the United States: An Uncertain Future* at 51-52 (1976).

todial work. 21.9 percent of all employed Puerto Ricans held such jobs, as compared with only 13.9 percent of the total employed population. Puerto Ricans, on the other hand, remain significantly under-represented in better-paying job categories, including craft positions. In 1976, only 10.5 percent of employed Puerto Ricans held jobs in craft or kindred fields.[7]

Because of this extreme underutilization of Puerto Ricans in the American workforce, *amici* have sought to maintain and expand both governmental programs and voluntary programs instituted through collective bargaining by employers and unions to improve the employment status of Puerto Rican citizens. *Amici* file this brief to show that the affirmative action program at issue in this case violates neither Title VII of the Civil Rights Act of 1964 nor the Constitution.

ARGUMENT

I.

Petitioners' affirmative action plan was properly instituted under Title VII in order to avoid Title VII liability.

In 1974 petitioners Kaiser Aluminum & Chemical Corporation ("Kaiser") and United Steelworkers of America ("USWA") adopted a new system for choosing entrants to on-the-job training for craft positions exclusively from within the Kaiser Gramercy plant. Title VII prohibits the use of criteria for promotion, job selection or admission to training programs that (1) are not job-related and (2) have a disparate negative impact on any protected group. Had it gone no further, the Kaiser-USWA closed training program would have had such a disparate negative impact on members of racial minorities, because of the relatively low proportion of minority persons employed at the Gramercy plant as compared to their percentage in the surounding work force. No job performance justification for this discriminatory result could reasonably have been expected to be shown. Petitioners' institution of such a system of selection exclusively from within would therefore have violated Title VII, unless petitioners simultaneously took measures to eliminate its disparate racial impact. By utilizing affirmative action in the form of racially conscious selection criteria, petitioners eliminated the disparate impact on minorities and avoided violating Title VII. This use of racially conscious selection criteria was therefore wholly consistent with, and indeed required by, Title VII.

[7] United States Bureau of the Census, *Current Population Reports*, Series P-20, No. 310, "Persons of Spanish Origin in the United States: March 1976" at 27 (July 1977).

A. Petitioner's Adoption of a Closed System for Selecting Applicants for On-the-Job Craft Training Would Have Violated Title VII, in the Absence of an Affirmative Action Component.

This Court's decisions have established the principle that an employer's or union's use of selection criteria that are racially neutral on their face, but that in application have a disproportionate negative impact upon a protected group and are not substantially related to the requirements of the job in question, violates Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425-26 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* holds that Title VII

> . . . proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If

an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. 401 U.S. at 431.

Petitioners' closed training program, if unaccompanied by a compensating affirmative action component, would be just such a practice. Prior to 1974, Kaiser had chosen entrants into on-the-job training for craft positions on the basis of prior craft experience (A. 71-72, 89-90).[8] As a result of the use of this criterion, virtually all of Kaiser's craft employees at the Gramercy plant were hired off the street, rather than from among Kaiser's existing employees at the plant (A. 121). In 1974, this criterion was replaced by a system of selecting entrants for on-the-job training exclusively from among the existing work force at the Gramercy plant. The new system jettisoned the experience requirement and substituted for it a requirement that the applicant for on-the-job training be a present employee at the Gramercy plant.

The new requirement of current employment, standing by itself, would clearly have had a disparate impact on members of racial minorities. Minority members comprised only 14.8 percent of the Kaiser Gramercy plant's hourly employees at the end of 1974 (A. 94), far below the 39 percent population in the available local labor force (A. 95). Whatever the reason for this disparity, which itself makes out a prima facie case for discrimination, *see Dothard* v. *Rawlinson*, 433 U.S. 321, 329-30 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977), it is evident that a job training selection system restricting eligibility to the existing Gramercy work force in 1974 would have operated disproportionately to

[8] References to the Appendix appear as "A".

exclude minority members from such training, because of their relative underrepresentation among the plant's employees. The result of the new closed training program, given its lack of "manifest relationship to the employment in question," *Griggs* v. *Duke Power Co.*, 401 U.S. at 432, would have been a violation of Title VII, which would in turn have been remediable by affirmative action. *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).[9]

[9] This result would not have been affected by the fact that the new closed training program system used seniority, which enjoys a specially protected status under Section 703(h) of Title VII, 42 U.S.C. §2000e-2(h), as a further means of selection from among the eligible group of existing employees. It is in the disproportionate impact of the closed system of selection itself on an employee group in which minority members are underrepresented that the Title VII violation inheres and not in the use of any additional winnowing device, be it seniority or a lottery, to select from among this already imbalanced group.

There is, moreover, a serious question as to whether the use of a seniority system as a further selection device on the facts presented by this case would constitute a "bona fide" seniority system within the meaning of Section 703(h), as construed by this Court's decisions in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). Section 703(h) was intended by Congress to insulate *existing*, otherwise *bona fide*, seniority systems from attack for merely perpetuating the effects of racial discrimination prior to, *Franks* v. *Bowman Transportation Co.*, or subsequent to, *International Brotherhood of Teamsters* v. *United States*, the effective date of Title VII. These cases cannot properly be extended to the situation where an employer or union chooses to use a seniority system *for the first time* as a device for allocating an employment benefit previously allocated according to other criteria, when the effect of such choice is to cause a disproportionate impact on a racial or ethnic minority group. The rationale of Section 703(h) is the protection of legitimate expectations of benefit engendered by an existing seniority system. No such expectations can exist when a benefit, as here, has never previously been conferred on a seniority basis.

B. Petitioners Could, Consistent With the Purposes of Title VII, Voluntarily Remedy the Title VII Violation That Their Closed Training Program Would Otherwise Have Created by Adopting an Affirmative Action Component to That Program.

1. *A Racially or Ethnically Conscious Selection Criterion Is a Proper Remedy for Title VII Violations.*

In *Franks* v. *Bowman Transportation Co., supra,* this Court held that affirmative action, including relief that affects the seniority rights of employees not affected by discrimination, may appropriately be required under Title VII in order to remedy fully the effects of unlawful employment discrimination on grounds of race. Such relief is available to all members of an affected class when the class as a whole has suffered from the discrimination at issue, 424 U.S. at 772-73, and may not be denied simply because the economic interests of other employees embodied in an existing seniority system are thereby affected. 424 U.S. at 744-75.[10] Thus, for example, if all minority employees in a plant had been victimized by an unlawful system of selection for job training based on racial discrimination, it would be appropriate to order as a remedy that all future job training vacancies be held open for minority employees until they regained the rightful status that they would have enjoyed but for the discrimination they suffered. *Cf.* 424 U.S. at 767-68.

[10] Although the Court has not expressly approved use of a racial "quota" as a form of affirmative action relief in an employment case, the Court has frequently approved of numerical remedies in school desegregation cases. *See, e.g., Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). The use of mathematical ratios for remedial purposes has also been approved in connection with reapportionment plans under §5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U.S. 144 (1977).

In the instant case, Kaiser and USWA chose a fair and reasonable way of eliminating the disparate racial impact implicit in the decision to confine the training program to current employees. On its face the program provides for the selection of minorities in rough proportion to their representation in the available workforce. As applied to respondent, the program is equally non-discriminatory. With half of training program positions reserved for minority group members, respondent Weber is indeed in a better position than he would be in if such positions were assigned by lottery to applicants from both within and outside the plant. He has the benefit of a seniority preference (Weber was employed in 1968, A. 55) that he would not have had under an open training program. *His* complaint is therefore no more than the untenable contention that he is entitled to the benefit of the disparate racial impact of the selection criteria employed.[11]

[11] The disapproval of racial quotas voiced in *Regents of the University of California* v. *Bakke,* 46 U.S.L.W. 4896 (June 28, 1978) does not require affirmance in this case. The plurality opinion in *Bakke* distinguished cases where findings of unlawful discrimination had been made, and by implication approved court-ordered or administratively required quota remedies in such cases. *See e.g. Carter* v. *Gallagher,* 452 F.2d 327 (8th Cir. 1971) (*en banc*), *cert. denied,* 406 U.S. 950 (1972; *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974). Since *amici* contend that petitioners' adoption of a closed training program would have constituted unlawful discrimination in violation of Title VII if it had not simultaneously been compensated for by affirmative action, approval of that plan is in no way inconsistent with anything said in *Bakke.*

2. *Petitioners' Vountary Adoption of a Quota Remedy Fulfilled the Purposes of Title VII by Avoiding the Violation of Title VII That Their Closed Training Program Would Otherwise Have Caused.*

If *amici* are correct that petitioners' use without affirmative action of a closed system of entry to on-the-job training would have violated Title VII because of its racially disproportionate impact, it follows that voluntary action by petitioners to remedy this situation was necessary to comply with, and promote the purposes of, Title VII. Congress emphasized, and this Court has recognized, the important place which voluntary compliance and self-evaluation by employees and unions occupy under the Title VII statutory scheme. *See, Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-18 (1975); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). *Cf., Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 246 (1965) ("The [1964 Civil Rights Act as finally adopted was most comprehensive, undertaking to prevent through voluntary and peaceful settlement discrimination in . . . employment"). As the court below acknowledged, voluntary compliance in eliminating unfair employment practices is preferable to court action, and encouraging settlement without litigation is the central theme of Title VII. 563 F.2d at 223. To force an employer or union to perpetuate practices which they themselves perceive as violating Title VII and to prohibit affirmative action remedies until suit is filed and the lengthy and costly process of litigation is concluded would run wholly counter to this basic goal of Congress. This Court should not mandate a result so clearly contrary to expressed legislative policy.

II.

Petitioners' affirmative action plan was properly instituted in order to comply with Executive Order 11246.

Executive Order 11246 requires federal contractors to take affirmative action to cure underutilization of minority group members in their work forces. The Executive Order, and the affirmative action which it mandates, do not depend for their applicability on a judicial or quasi-judicial finding of past intentional discrimination by a specific covered employer; rather, they implement a general policy determination that contractors and subcontractors with the United States should strive to achieve a workforce integrated in fact. The Executive Order is a valid response to this determination, which conflicts with neither Title VII nor the constitutional limits on the power of the federal government.

A. Executive Order 11246's Requirement for Affirmative Action by Government Contractors Is Not Dependent Upon a Finding of Past Discrimination by Employers Subject to the Order.

Unlike Title VII, which refers to affirmative action only in its remedial provisions, Section 706(g), 42 U.S.C. § 2000e-5(g), Executive Order 11246's clear language mandates affirmative action as a substantive obligation upon all government contractors within its purview. Section 202 of the Order, 3 C.F.R. 339 (1964-65 compilation), requires all government contractors to agree that

> The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin . . . . *The contractor will take affirmative action* to ensure that appli-

> cants are employed and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. *Such action shall include,* but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and *selection for job training,* including apprenticeship. (emphasis supplied)

If the Executive Order were intended to proscribe only intentional discrimination, it would not have needed to continue beyond its first sentence, which prohibits employment discrimination in terms virtually identical to those of Title VII. *See* Section 703(a), 42 U.S.C. § 2000e-2(a). But Section 202 of the Order does continue, and imposes an additional affirmative action obligation upon employers within its scope. This additional obligation is the obligation to take steps to remedy the underutilization of minorities and to bring about integration in fact. 41 C.F.R. §§ 60-1.40, 60-2.2(a), 60-2.10 (1977).

Because Executive Order 11246 expressly provides for affirmative action in the first instance as a substantive obligation of all government contractors, it should not be read as requiring a prior finding of specific past discrimination by a given employer as a necessary condition to such employer's affirmative action obligation. Such a reading would be contrary to both the language and structure of the Executive Order and to its interpretation by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCC"), whose regulations, 41 C.F.R. § 60-1.1 *et seq.* (1978), require all employers covered by the Order to prepare goals and time-tables for increasing the

utilization of minority personnel in the higher-paying job categories from which they have historically been excluded.[12]

Faced with the disproportion of minority members in craft positions at the Gramercy plant relative to the surrounding labor force, petitioners were thus required by Executive Order 11246 to institute an affirmative action program for increasing minority representation in these positions. Under the Executive Order program, petitioners were not first required to concede that they had been guilty of past intentional discrimination, since their affirmative action obligation existed independent of any finding of past discrimination. To require a concession of this nature would tend to act as a disincentive to the instituting of affirmative action programs, because such a concession might leave employers and unions open to back-pay liability under Title VII. Moreover, such a requirement would run counter to the emphasis that Executive Order 11246, like Title VII, puts upon voluntary compliance efforts. *See* 41 C.F.R. § 60-2.2(c)(3) (" . . . every effort will be made through conciliation, mediation, and persuasion to resolve the deficiencies . . . " in employer's affirmative action plans).

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[12] These regulations are entitled to the more than ordinary deference due to an administrative agency's interpretation of an Executive Order which it is charged with administering. *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965). They include a specific finding by the OFCC that "[b]ased upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following . . . designations," a list which includes "craftsmen (skilled)." 41 C.F.R. §60-2.11 (1978).

B. Executive Order 11246, Insofar as It Requires Affirmative Action Affecting the Economic Interests of Non-Minority Employees, Is Consistent With Both Title VII and the Constitution.

1. Executive Order 11246 Is Consistent With Title VII.

The starting point for any discussion of potential conflicts between executive action and a congressionally enacted statute must be the opinions of the members of this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Justice Jackson there set forth three categories for analyzing challenges to the validity of action taken by the President. 343 U.S. at 635-38. The first involves situations in which the President acts pursuant to an express or implied authorization of Congress; as to such actions, his authority is at a maximum. The second category involves situations in which the President acts in the absence of either a congressional grant or denial of authority; as to these actions, judicial evaluation must proceed on a case-by-case basis, turning on the particular facts of each exercise of executive authority. Finally, the third category involves those situations in which the President takes measures incompatible with the express or implied will of Congress; as to such measures, the claims of the executive must be scrutinized with caution in order to prevent an unconstitutional derogation of congressional power.

Application of these principles to the facts presented in this case yields the conclusion that Executive Order 11246 has been impliedly endorsed by Congress and implicitly exempted from any constraints on affirmative action that may be embodied in Title VII. It therefore falls within the first category set forth in Justice Jackson's schema, and must be deemed to be "supported by the strongest of presumptions and the widest latitude of judicial interpretation," making "the burden of persuasion . . . rest heavily upon any who might attack it". 343 U.S. at 637.

As Judge Wisdom pointed out in dissent below, 563 F.2d at 237-37, numerous actions taken and statements made during Congress' consideration of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, amending Title VII, evidenced congressional exemption of Executive Order 11246 from what was perceived as a more limited scope for affirmative action under Title VII. In supporting an amendment designed to reject an earlier proposal to transfer the enforcement of the Executive Order from the OFCC to the Equal Employment Opportunity Commission, Senator Saxbe stated:

> "It has been the 'goals and timetables' approach which is unique to the OFCC's efforts in equal employment, coupled with extensive reporting and monitoring procedures that has given the promise of equal employment opportunity a new credibility.
>
> The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required." 118 Cong. Rec. 1385 (1972).

Senator Williams, although opposing Senator Saxbe's amendment for other reasons, evinced the same understanding of the distinctive scope of Executive Order 11246, as compared with that of Title VII.

> The key to the Office of Federal Contract Compliance's approach is affirmative action. It is not a situation, although it could well be called one, of correcting persisting discrimination in its most well understood form. It involves an effort *regardless of the past history of the employer* to upgrade and improve its minority work force. 118 Cong. Rec. 1389 (1972) (emphasis supplied)

Both proponents and opponents of this amendment (which the Senate passed) thus demonstrated that they approved of imposing a primary obligation upon government contractors under Executive Order 11246 to take affirmative action to upgrade and more fully utilize minority employees.

Similar intent to preserve affirmative action under Executive Order 11246 is shown by the Senate's rejection of an amendment to Section 703(j) of Title VII, offered by Senator Ervin, which would have extended that section to read:

> "Nothing contained in this title *or in Executive Order No. 11246, or in any other law or Executive Order,* shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . " 118 Cong. Rec. 4917-4918 (1972). (emphasis supplied.)

By rejecting this attempt to prevent Executive Order 11246 from requiring "preferential treatment" for any individual, Congress by plain implication approved the continued requirement of affirmative action in appropriate cases under the Executive Order. *Compare* statement of Sen. Ervin, 118 Cong. Rec. 1663-64, with statement of Sen. Javits, 118 Cong. Rec. 1664-65.

Finally, the section-by-section analysis of the amendments undertaken by the Senate Subcommittee on Labor provided:

> "In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of Equal Employment Opportunity Act of 1972 at 1884 (1972).

Since such "present case law" included the decision in *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971), which upheld the imposition of quotas for craft hiring under Executive Order 11246 pursuant to the so-called "Philadelphia Plan," it is evident that Congress approved the decision in that case as a correct statement of the law. *Amici* submit that Congress' intention is clear that affirmative action should continue to be required of government contractors and subcontractors under Executive Order 11246.

2. *Executive Order 11246 Is Consistent With Constitutional Limitations on Federal Power.*

By its terms, the applicability of Executive Order 11246 does not hinge on proving prior specific acts of intentional discrimination by a given employer. The legislative history discussed above offers no suggestion that Congress had a different understanding of what the Order means. There can be no question of the general power of the federal government to demand that those who contract with it comply with congressionally articulated policy, *see Perkins*

v. *Lukens Steel Co.,* 310 U.S. 113, 127 (1940), or of Congress' power to enact legislation concerning discrimination in employment affecting commerce, *see National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), and to authorize presidential action consistent with such legislation. The inquiry then becomes, does anything in the Fifth Amendment to the Constitution nonetheless prohibit the exercise of federal power to require affirmative action to cure underutilization of minority workers in the absence of a concession or adjudication of intentional discrimination?

Although the Fifth Amendment does not contain an equal protection clause like that of the Fourteenth Amendment, the federal government is nevertheless required to avoid utilization of irrational or invidious classifications that violate the Fifth Amendment's Due Process Clause. The similarities and differences between the equal protection guaranteed by the Due Process Clause of the Fifth Amendment on the part of the federal government and the "equal protection of the laws" required of state governments by the Fourteenth Amendment were first described by this Court in *Bolling* v. *Sharpe,* 347 U.S. 497 (1954):

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American idea of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two

> are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. 347 U.S. at 499.

The Court has recently had occasion in *Hampton* v. *Mow Sun Wong,* 426 U.S. 88 (1976) to discuss further the constitutional differences between the two concepts, as well as their similarities, in considering a challenge by resident aliens to federal regulations restricting civil service employment to United States citizens.

> Although both Amendments require the same type of analysis, see *Buckley* v. *Valeo,* 424 U.S. 1, 93, the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but *more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.* On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause. 426 U.S. at 100. (emphasis supplied.)

The teaching of *Hampton* v. *Mow Sun Wong* is that the federal government may utilize classifications that would be impermissible for a state in service of overriding national interests and policies that are entrusted peculiarly to its care. *See also Examining Board* v. *Flores de Otero,* 426 U.S. 572, 608 (1976) (Rehnquist, J. dissenting in part). The basic equal protection analysis, of course, remains the same, *Buckley* v. *Valeo,* 424 U.S. 1, 93 (1976), and the

Court must closely scrutinize any federal classification involving racial criteria. *See Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954).

It is in light of these principles that the Court should analyze any asserted conflict between the action of the federal government under Executive Order 11246, as approved and sanctioned by Congress, and the Due Process Clause of the Fifth Amendment. Affirmative action under the Executive Order, as in the instant case, may require the use of racially conscious selection criteria designed to eliminate the underutilization of minorities over a fixed period of time. Analysis of the affirmative action plan in this case, however, demonstrates that the use of quotas here is not arbitrary but rather is a necessary measure to cure a substantial underutilization of minority workers and to achieve integration in fact. The plan is based on criteria laid down by the OFCC, the administrative agency responsible for enforcing Executive Order 11246, and reflects that agency's experience with the problems of employment discrimination. *See* 41 C.F.R.§ 60-2.11 (1978). Such affirmative action programs do not displace any nonminority worker from his job, nor do they require the selection of those less qualified at the expense of the more qualified.[13]

[13] This factor, together with the absence of state action which invokes the Equal Protection Clause of the Fourteenth Amendment, significantly distinguishes the instant case from *Regents of the University of California* v. *Bakke,* 46 U.S.L.W. 4896 (June 28, 1978), where the record demonstrated a selection of medical school applicants under the University's affirmative action program who were less qualified than the respondent Bakke in terms of the University's own selection criteria. Here, by contrast, selection in the absence of affirmative action would have been solely on the basis of plant seniority, a qualification which is not job-related and which replaced the previous criterion of prior experience for admission to craft training at Kaiser's Gramercy plant.

This Court has been faced before with situations in which action on a broad scale was taken by the federal government to prevent and to remove the effects of discrimination. In *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), the Court upheld as a proper exercise of congressional power Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. 1973b(e), which prevented the enforcement of a New York statute having a discriminatory effect upon Spanish-speaking persons (largely Puerto Ricans) despite the absence of any finding that the constitutional rights of these people had been violated. Although *Katzenbach* v. *Morgan* involved Congress' powers under Section 5 of the Fourteenth Amendment, its clear implication is that when the federal government acts in a principled way to foster the constitutional goal of equal opportunity, it may require remedial measures which do not depend for their application on an official declaration of the existence of prior intentional discrimination. Here, the federal government has acted through Executive Order 11246, and Congress has approved its action as consistent with the provisions of Title VII. Unlike the situation in *Regents of the University of California* v. *Bakke, supra,* a responsible governmental agency, with the approval of Congress, has identified the existence of discrimination or its aftereffects, and provided an appropriate remedy. The due process mandate of the Fifth Amendment, proscribing discrimination that is "so unjustifiable as to be violative of due process," *Bolling* v. *Sharpe,* 387 U.S. at 499, has not been transgressed. The validity of petitioner's action taken pursuant to Executive Order 11246 should therefore be upheld by this Court.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

JORGE BATISTA
ROBERT HERMANN
Puerto Rican Legal Defense
and Education Fund
95 Madison Avenue
New York, New York 10016

EVAN A. DAVIS
JONATHAN I. BLACKMAN
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One State Street Plaza
New York, New York 10004
Attorneys for Amici Curiae

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